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Supreme Court, U.S.
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No. 88-1244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE M/T STOLT SHEAF, her Engines, Boilers, etc.,
POSIDEN NAVIGATION, INC.,
PARCEL TANKERS, INC., STOLT-NIELSEN, INC.,
and STOLT-NIELSEN A/S,

Petitioners,

– against –

NATIONAL PETROCHEMICAL COMPANY OF IRAN,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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24 pp

QUESTION PRESENTED

May the Executive Branch direct an Article III court of the United States to accord access and standing to sue to an instrumentality of the Islamic Republic of Iran?

LIST OF PARTIES

The parties to this proceeding are National Petrochemical Company of Iran, Respondent, and the M/T Stolt Sheaf, Posiden Navigation, Inc., Parcel Tankers, Inc., Stolt-Nielsen,, Inc. and Stolt-Nielsen, A/S, Petitioners. Pursuant to Supreme Court Rule 28.1 the parents, subsidiaries and affiliates of Petitioner are set forth at page 19a of the Appendix to the Petition for a writ of Certiorari. The parents of Respondent are the National Iranian Oil Company and the Islamic Republic of

LIST OF PARTIES

Continued

Iran. Other affiliates and subsidiaries of Respondent would be all other agencies and instrumentalities of the Islamic Republic of Iran, including those set forth below.

Abadan Petrochemical Co.

Razi Chemical Co.

Shiraz Petrochemical Co.

Iran-Nipon Petrochemical Co.

Iran-Japon Petrochemical Co.

Iran-Carbon Co.

Kharg Chemical Co.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 860 F.2d 551. It is reprinted at pages 1a-12a of the appendix attached to the Petition for a Writ of Certiorari (the "Appendix"). The opinion of the United States District Court for the Southern District of New York (Owen, J.) is reported at 671 F.Supp. 1009. It is reprinted at pages 15a-17a of the Appendix.

JURISDICTION

Respondent agrees with Petitioner's jurisdictional statement.

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition involves Article II, §§ 2 and 3 and Article III, § 1 of the Constitution, reprinted at page 18a of the Appendix.

STATEMENT OF THE CASE

National Petrochemical Company of Iran ("NPC") is a corporation organized under the laws of Iran and is wholly owned by the National Iranian Oil Company ("NIOC"). NIOC is wholly owned by the Government of Iran. The instant action arises out of an agreement of the plaintiff, NPC, to

purchase various quantities of chemicals from Monnris Enterprises ("Monnris"), a chemical trading company with offices in Dubai, United Arab Emirates. Monnris sought to obtain the chemicals it was to supply to NPC from Rotexchemie Brunst & Co. of Hamburg ("Rotex"). Rotex, through an affiliated company, Formula S.A. of Geneva Switzerland ("Formula"), purchased the required chemicals from sellers in the United States. The chemicals were represented to plaintiff and Monnris as having been purchased in Europe. Various documents of title evidencing a point of origin in Europe were created in furtherance of the scheme to defraud NPC.

Formula and Rotex chartered the M/T Stolt Sheaf through companies affiliated with Stolt-Nielson, Inc. ("Stolt (USA)") and Stolt-Neilson A/S ("Stolt (Norway)"). The ships were chartered to deliver the cargo to Iran. However, Rotex with the assistance of the defendants did not deliver the cargo to NPC in Iran but sold the same in Taiwan without accounting to NPC or Monnris for any of the proceeds of such sale. The scheme by which the sale was effectuated involved forged documents of title and other irregularities. The details of the transactions and defendants' participation therein are not germane

to the issue before the Court and will be presented when the merits of the case are addressed.

The defendants moved to dismiss NPC's complaint on the ground that NPC lacked standing to sue in courts in the United States because the Government of Iran is not recognized by the United States. In October, 1987, the District Court granted the motion and an appeal was taken. The Court of Appeals reversed the decision of the District Court by order dated October 31, 1988. The Court of Appeals relied on a number of factors, including a specific statement in the amicus curiae brief filed by the United States that

the Iranian government and its instrumentalities should have access to United States courts.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals for the Second Circuit reiterates the long established principle that the Judiciary will defer to the Executive Branch's determination that a foreign government should be permitted access to United States courts. The Court of Appeals did not reach and they did not decide the issue of whether the Executive Branch had the power to give access to a foreign government in a single case. Even if the Court of Appeals were deemed to

have decided that the Executive Branch did have the power to permit access to United States courts, such an issue is of little significance to anyone other than the particular litigant in the case in which access is authorized.

1. The Court of Appeals Decision is Consonant with Long Established Constitutional Principles.

The Court of Appeals considered two issues in its decision below. First, was formal recognition the touchstone for determining whether a foreign government should be permitted access to United States courts? Pages 7a-10a of the Appendix. Second, has the Executive Branch evidenced its position on Iran's access

to United States courts? Pages 10a-11a in the Appendix.

In determining that formal recognition was not the touchstone for determining whether a foreign government should be permitted access to United States courts, the Court of Appeals relied upon and adhered to established precedents of this Court. This Court in Banco Nacional de Cuba v. Sabbatino, 84 S.Ct. 923, 11 L.Ed.2d 804, 376 U.S. 398 (1964) specially stated that severance of diplomatic relations does not in and of itself evidence the Executive Branch's position that the foreign government should not be permitted access to

United States courts. The Court of Appeals also relied on the President's implied power to maintain international relations as a basis for the President's power to deal with foreign governments outside the bounds of formal recognition. United States v. Curtis-Wright Export Corp., 57 S.Ct. 216, 81 L.Ed. 255, 299 U.S. 304 (1936).

Finally, the Court of Appeals noted that the practice of extending formal recognition to new governments by the United States has been deemphasized. Thus, use of formal recognition as a touchstone for determining whether a foreign government should be permitted access

to United States Courts was not warranted.

The Court of Appeals then considered whether the Executive Branch had evidenced a position that Iran be accorded access to United States courts. The Court of Appeals stated

> Several facts persuasively indicate such a willingness [to permit access]. For example, Iran and the United States entered into the Algerian Accords to resolve the embassy personnel crisis; an ongoing Iran-United States Claims Tribunal at the Hague continues to adjudicate disputes between the two countries; and the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran remains in full force and effect. Pages 10a-11a of the Appendix.

These factors plus the Suggestion of Interest filed by the Executive Branch

in the instant case stating that Iran should be afforded access to United States courts was conclusive of the Executive Branch's position on Iran's access to United States courts.

2. The Court of Appeals Never Considered the Power of the Executive Branch to Permit Access to a Foreign Government or its Instrumentality in a Single Case.

The Court of Appeals specifically addressed Petitioner's argument that the Executive Branch was claiming a new power to permit access in a single case. The Court of Appeals specifically stated that it need not reach the issue

> because there is no indication that this is an arbitrary or ad hoc directive. This is not a case where the Executive Branch is attempting to prohibit a formally

> recognized government from bringing a single suit in the United States courts, nor is it a case where the Executive Branch is arbitrarily allowing some suits by an unrecognized nation while disallowing others. Page 11a of the Appendix.

The Court of Appeals clearly rested its decision on a basis other than the issue on which Petitioners seek review. It would be inappropriate for the Court to hear an appeal of a case on an abstract legal issue not raised by the facts of the case nor relied upon by the Court of Appeals in rendering its decision.

3. Assuming, Arguendo, That the Court of Appeals Did Confirm the Executive Branch's Power to Permit Single Case Access, Such a Decision is not of Major National Consequence.

It must be kept in mind that the Respondent's claims are justiciable and for purposes of this appeal must be presumed properly in the United States courts. The only reason access to the courts will be denied is for political considerations wholly unrelated to the individual litigant's case. The only injury litigants such as Petitioners can claim is that they are being required to defend a claim that they would have had to defend if the plaintiff were anyone other than a

foreign government or instrumentality. The mere fact that other potential defendants in suits brought by the foreign government are not required to defend those claims in the United States because of political considerations unrelated to their claims hardly gives Petitioners a constitutional right not to have to defend against validly brought claims because the Executive Branch determines that political considerations do not require denial of access in Petitioners' particular case.

Such case by case determinations are very similar to the ad hoc immunity determinations that the

Executive Branch made prior to the adoption of the Foreign Sovereign Immunities Act 28 U.S.C. §1602 et seq. See legislative history to Foreign Sovereign Immunities Act. H. R. Rep. No. 94-1487, 94th Cong., 1976 5 U.S. Code Cong. & Adm. News 6604. The Executive Branch's power to make such determinations has never been questioned. Applying the same principles to questions of access to United States courts would not break new ground.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari to review the Order and opinion of the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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